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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 929

222 East Chestnut Street Corporation, a corporation of Delaware,
Petitioner,

vs.

Board of Appeals of the City of Chicago, Samuel T. Lawton, B. Emmet Hartnett, H. Evert Kincaid, C. Logan McEwen, and Robert C. Ostergren, individually and as members of the Board of Appeals of the City of Chicago; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; Lakefront Realty Corporation, a corporation of Illinois; Lake Shore Club of Chicago, a corporation of Illinois; City of Chicago, a municipal corporation of Cook County, Illinois; DeWitt Towers Corporation, a corporation; DeWitt Hotel, Inc., a corporation; Greater North Michigan Avenue Association; Northwestern University; American Hospital Association,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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INDEX.

	PAGE
Opinion Below (Appendix A)	1
Opinion below in companion case (No. 34210)—Appendix A	1
Jurisdiction	2
Questions presented for review	2
Statute involved—Appendix B	3
Statement of the Case	4
Chicago Zoning Ordinance, Sections 15 and 18	5
Denial by Commissioner of building permit because proposed structure in violation of zoning ordinance as to 10% front line setback and ground area occupied	6
Petitioner owner of 19 story unfurnished apartment building on same street, 293 feet obliquely from proposed structure	6
Argumentative exhibit showing location and dimensions of proposed structure and distances from petitioner's property and from N. Lake Shore Dr.	7
Hartnett one of the 5 members of Zoning Board sat at hearings and took active part; his examination of witness Stanton	8
Hartnett is president of respondent Club	9
After conclusion of public hearing, Board receives documentary evidence from applicant without knowledge of petitioner	9
Board's decision in alternative: first, no variation necessary because structure permissible under Board's construction of zoning ordinance; second, in the alternative, if Board's construction of zoning ordinance erroneous, a variation should be allowed	9

PAGE

Petitioner's complaint for administrative review alleging action of Board constituted a violation of due process and setting up, among other things, the recently discovered conflict of interest in prejudice on the part of Hartnett, a Board member and also president of respondent Club 10

Motions of respondents to dismiss; motions overruled; respondents file answers 10

Petitioner's motion to delete from Board record documents offered after conclusion of the hearing; motion denied 10

Petitioner participated in proceeding without objection from anyone that petitioner not a proper party to bring administrative review 10

Trial court's oral opinion; formal judgment that proposed structure would be a permitted use; that grant by Board of variation be disregarded as surplusage 10, 11

Petitioner's appeal to state supreme court; defendant's brief relies on "permitted use" treats any other language as surplusage; issue before state supreme court not propriety or legality of variation, but whether hearing had been in accord with due process and what was proper construction of zoning ordinance 11

Later companion case in state supreme court No. 34210; this case involved a zoning variation in another block and did not involve the federal question, the denial of due process involved here; did not involve abandonment of zoning variation and reliance on "permitted use" as here; state court decided second case first and cited opinion in second case in opinion of first case 11

State court did not pass on or refer to federal question of denial of due process or to merits of case 12

PAGE

Illinois statute provides that any owner or tenant of real property in the same contiguous zoning district may institute action to prevent unlawful construction, etc. 13

Stage of proceedings in court of first instance and in the Appellate Court at which, and manner and method in which federal questions sought to be reviewed were raised. Appendix C—Memorandum of above points 13

Copy of judgment of court below. Appendix D 14

Argument 15

1. On petition for certiorari to review a judgment of a state court as denying or not duly recognizing a federal right set up therein, it is the Supreme Court's power to inquire not only whether said right was denied in direct terms, but also whether it was denied in substance and in effect by interposing a "non-federal" ground of decision without fair support 15

a) The state court opinion disregarded 2 important points: (i) the record here presents—not an issue of a zoning variation as the opinion states—but an issue of the violation of an existing zoning regulation and (ii) consequently, even under the court's narrow construction of the state statute, petitioner was a proper party to bring administrative review 16

Respondents in the state court have elected to abandon the theory of "zoning variation" and to rely solely on the theory of "permitted use." 16, 17

b) Even if the state court were right in regarding the issue as one of propriety of a zoning variation—its holding that petitioner was disqualified from bringing suit, would still have no substantial basis 17

(i) The state court's opinion disregards the objectives of the zoning regulation, in that the proposed garage will certainly increase street congestion and air pollution and will probably increase fire hazard 17, 18

PAGE

The courts of other jurisdictions, with substantial unanimity have held that a neighboring property owner without making any special showing of damage—has a right to bring action to oppose an application for a zoning variation 18

(ii) The state court's opinion disregarded the fact that the state court itself had repeatedly recognized the right of a property owner in the vicinity to bring action for administrative review of a zoning variation without any showing of special damage 19

Winston v. Zoning Board, 407 Ill. 588, the only case cited by the state court, is distinguishable for several reasons 19

(iii) The point that no special damage had been proved and petitioner has not established its rights as a proper party, not having been raised below, could not, under previous decisions of the state court, be first raised on appeal 20

Petitioner had participated in the hearings before the board, all without objection 20

Petitioner had participated in the hearing before the trial court, all without objection 20

(iv) The order of the disposition of the case, whereby the state court first disposed of case No. 34210 and then used the opinion in that case as a basis for its opinion in the present case, No. 34074—indicates that the state court was putting its decision here on an unsubstantial non-federal ground 21

(v) The cumulative effect of these matters is conclusive that the state court was denying petitioner's right to due process by interposing a non-federal ground of no substance 22

2. It was a denial of due process for the zoning board to hear this matter with Hartnett, president of respondent-applicant, participating 22

PAGE

The fact that Hartnett is not shown as voting at the actual decision does not cure the lack of due process 23

Tumey v. Ohio, 273 U.S. 510; In re Murchison, 349 U.S. 133 ..... 23, 24

The state supreme court has decided in many cases (the last very recently) that where an arbiter has a financial interest in the subject matter, it is his duty to recuse himself 24-25

Barbara Realty Company v. Zoning Board of Review, 128 A. 2d 342, ... R.I. ..... (Jan. 10, 1957) a recent applicable case 26

Once the tribunal has been revealed as prejudiced, no showing of any particular incidence of prejudice is required. However, there is such evidence here. The Board, in order to allow the club to build the proposed structure with its north line on Chestnut St., distorted the language of the zoning ordinance and held that the front line of the structure would not be on Chestnut Street, but on Lake Shore Drive, 267 feet away. 26

A reasonable conclusion that this distortion of the meaning of the ordinance was caused by obvious wish of the Board to help their fellow member Hartnett 27

3. It was a denial of due process for the Board to receive or consider evidence not presented at open hearing and as to which petitioner had no opportunity to inspect, etc. 27

Various documents were so considered by the Board 27

In addition, the Board obviously gave consideration to testimony about colloquy between witness Stanton and Board member Hartnett, outside of the hearing 28

State court decisions hold that administrative agency must act only on evidence presented in the case with opportunity to all parties to know, to inspect, etc. 29

PAGE

Morgan vs. U.S., 298 U.S. 468, 480; definition of due process 29-30

4. It was a denial of due process for the Board to hear the case on an issue that was not properly before it 30

The Board had jurisdiction to hear the case only on the issue presented in the statutory notice; this notice related to an application for zoning variation 31

The Board, after conclusion of the hearing, shifted the issue in case from application for zoning variation, to review of Commissioner's ruling and reversed Commissioner 31

This was done without notice and was a violation of due process 31

5. Under the state statute, great weight attached to findings and conclusions of administrative agency on questions of fact. 32

Conclusion 32

The state court, in effort to avoid consideration of federal question, placed its decision on an unsubstantial, non-federal ground 33

Administrative tribunals increasing in number, in scope; important that they proceed in accord with due process 33

This case important because of property amounts involved; also important because of federal right to due process not recognized by state agency or state courts 33

Appendix A—opinion state supreme court, docket No. 34074, 10 Ill. 2d 130 (instant case) .....App. 1a, 2a

Opinion in case No. 34210, companion case .....App. 3a-6a

Appendix B—Ill. Rev. St. 1955, Ch. 24, Art. 73, Special Powers—Zoning .....App. 7a

PAGE

Art. 73-1—Objectives of article, etc. .....App. 7a, 8a

Art. 73-4—Enforcement officers—board of appeals .....App. 9a-11a

Art. 73-5—Appeals to board of appeals .....App. 11a, 12a

Art. 73-9—Proceedings to prevent violation ..App. 12a, 13a

Appendix C—Memorandum of stage of proceedings in the court of first instance and in the appellate court in which the federal questions sought to be reviewed were raised .....App. 14a

a. Complaint for administrative review .....App. 14a-16a

b. Written motion of petitioner to exclude certain evidence; motion denied .....App. 16a

c. Propositions of law submitted by petitioner presenting federal issues .....App. 16a-18a

Propositions of law denied .....App. 18a

d. Brief of petitioner before supreme court of Illinois .....App. 18a, 19a

Appendix D—Final order of supreme court of Illinois (Nov. 26, 1956) .....App. 20a, 21a

Order denying petition for rehearing (Jan. 23, 1957) .....App. 22a

TABLE OF CASES, STATUTES AND ORDINANCES CITED.

PAGE

Abbott v. Zoning Board, 78 R.I. 84, 79 A. 2d 620 19

Barbara Realty Company v. Zoning Board, 128 A. 2d 342, ... R.I. 26

Bayport Civic Ass'n. v. Koehler, 138 N.Y.S. 2d 524 18

Blanchard v. Lewis, 414 Ill. 515 21

Broad River Power Company v. South Carolina, 281 U.S. 537, 540 15

C. & E. I. Ry. Co. v. Commerce Commission, 341 Ill. 277 29

City of Naperville v. Wehrle, 340 Ill. 579 25

Clark v. Board of Zoning Appeals, 301 N.Y. 86, 89, 92 N.E. 2d 903 18

Commissioners of Drainage v. Smith, 233 Ill. 417 25

Flick v. Gately, 328 Ill. App. 81 29

Heady v. Zoning Board, 139 Conn. 463, 94 A. 2d 789 18

Hutchinson v. Board of Zoning Appeals, 138 Conn. 247, 83 A. 2d 201 18

In re Estate of Leichtenberg, 7 Ill. 2d 545 21

In re Heirich, 10 Ill. 2d 357 25

In re Murchison, 349 U.S. 133 24

Lacey v. Zoning Board, 4 N. J. Super 422, 67 A. 2d 466 18

Lewis Drainage Dist. v. Melville, 388 Ill. 526 31

Lindburg v. Zoning Board, 8 Ill. 2d 254 19

Mayor and City Council of Baltimore v. Byrd, 191 Md. 632, 62 A. 2d 588 18

Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284 19

PAGE

Morgan v. U. S., 298 U.S. 468 29-30

Northern Trust Co. v. Sanford, 308 Ill. 381 31

Pasfield v. Donovan, 7 Ill. 2d 563 13

R. I. R.R. Co. v. Lynch, 23 Ill. 597 25

Sheaff v. Spindler, 339 Ill. 540 31

Smith v. Department of Registration, 412 Ill. 332 ..... 25, 29

Spaulding v. Board of Appeals, ... Mass. ....., 138 N.E. 2d 367 18

Sunderland v. Building Inspector, 328 Mass. 638, 105 N.E. 2d 471 18

Tumey v. Ohio, 273 U.S. 510 23

Welton v. Hamilton, 344 Ill. 82 19

Winston v. Zoning Board, 407 Ill. 588 (distinguished).. 19

STATUTES.

U.S.C.A. Title 28, Sec. 1257(3) 2

Ill. Rev. Stat. 1955, Ch. 24, Art. 73-1 ..... 3, 4, 18

Art. 73-3 (C) .. (footnote) 23

Art. 73-3 (E) .. (footnote) 23

Art. 73-4 3

Art. 73-5 3

Art. 73-9 ..... 4, 13, 16, 17

Ill. Rev. Stat. 1955, Ch. 110, Section 274 32

ORDINANCES.

Municipal Code of Chicago, Chaper 194A (Chicago Zoning Ordinance) sections 15 and 18 5

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Board of Appeals of the City of Chicago, Samuel T. Lawton, B. Emmet Hartnett, H. Evert Kincaid, C. Logan McEwen, and Robert C. Ostergren, individually and as members of the Board of Appeals of the City of Chicago; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; Lakefront Realty Corporation, a corporation of Illinois; Lake Shore Club of Chicago, a corporation of Illinois; City of Chicago, a municipal corporation of Cook County, Illinois; DeWitt Towers Corporation, a corporation; DeWitt Hotel, Inc., a corporation; Greater North Michigan Avenue Association; Northwestern University; American Hospital Association,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

222 East Chestnut Street Corporation, a corporation of Delaware, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled cause on November 23, 1956.

Opinion below.

The opinion of the Supreme Court of Illinois (No. 34074) is reported in 10 Ill. 2d 130; a copy thereof is

attached hereto in **Appendix A**. The court's opinion cites the opinion in a companion case decided the same day (No. 34210) 10 Ill. 2d 132; this opinion also is included in Appendix A.

Jurisdiction.

(i) The judgment of the Supreme Court of Illinois is dated and was entered on November 26, 1956. (ii) The date of the order denying the rehearing was January 23, 1957. (iii) The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari, is Title 28, U.S.C.A., Sec. 1257(3).

Questions presented for review:

Respondent Lake Shore Club through its affiliate Lakefront Realty Corporation, applied to the Commissioner of Buildings of Chicago for a building permit to erect a garage structure, four stories high and two stories underground, to park 268 automobiles. The Commissioner denied the permit because the proposed structure would be in violation of the Chicago Zoning Ordinance requirements as to front line setback and maximum use of ground area. Lake Shore, through Lakefront Realty, then filed an application with Chicago Zoning Board, for a variation from the zoning requirements as to front line setback and maximum ground area of structure. The statutory notice was published for a hearing on a zoning variation, and the hearing was conducted by the Board on this issue. After a contested hearing at which petitioner objected to the proposed variation, the Board filed a decision permitting the structure. One B. Emmet Hartnett was a member of the Board and participated in the hearings. Subsequently to the Board's decision, it was disclosed that Hartnett, during the en-

tire pendency of the matter before the Board, was president of applicant Lake Shore Club, respondent here.

The questions presented for review are:

(1) Whether it was a denial of due process for the Board to hear and determine the matter when Hartnett, the president of the applicant (and as such an interested party) was a member of the Board and participated in the hearing.

(2) Whether it was a denial of due process for the Board to consider documents or statements not offered in evidence and as to which petitioner had no opportunity to inspect, consider and cross-examine witnesses or offer evidence in explanation or rebuttal.

(3) Whether it was denial of due process for the Board to review the correctness of and reverse the decision of the Commissioner of Buildings in denying a building permit, when the only issue legally before the Board was the application for a zoning variation.

Statute involved.

Ill. Rev. Stat. 1955, Ch. 24, Art. 73 is the enabling act under which municipalities in that state are given power to zone. Art. 73-1 sets out the objectives of the article, classification, regulation and location of uses and structures; Art. 73-4, provides that variations may be allowed by the Board (after public hearing preceded by publication of notice) when the variation is in harmony with the general purpose and intent of the regulations and only in cases where there are "practical difficulties" or "particular hardship" in the way of carrying out the strict letter of the regulations, any such variation to be accompanied by findings of fact as to the reasons therefor; Article 73-5 provides for appeals

to the Board from orders of municipal officials and the procedure therein; Art. 73-9 provides that an owner or tenant of real property in the same contiguous zoning district may institute any appropriate action or proceeding to prevent the unlawful construction, etc. in violation of the zoning regulations. The four sections are set out verbatim in **Appendix B** hereto.

Statement of the Case.

The Illinois statute on Cities and Villages has a special article giving municipalities power to enact zoning regulations (Ill. Rev. St. 1955, Ch. 24, Art. 73, Appendix B hereto). The statute commences by reciting the legislative purposes: "To the end that adequate light, pure air, and safety from fire and other dangers may be secured; that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted." The statute gives the corporate authorities in each municipality certain specific powers:

> "(1) To regulate and limit the height and bulk of buildings hereafter to be erected; (2) To establish, regulate and limit the building or set back lines on or along any street, traffic-way, drive or parkway; (3) To regulate and limit the intensity of the use of lot areas and to regulate and determine the area of open spaces, within and surrounding such buildings;"

The City of Chicago, pursuant to the enabling statute, has adopted a comprehensive zoning ordinance. The land areas here involved are situated on E. Chestnut St. about one mile north of the Chicago Loop; under the zoning ordinance, these land areas are classified as

4th Volume Apartment House District. The ordinance provides for the front line setback, rear line setback and intensity of use restrictions, reading as follows (Municipal Code of Chicago, Chapter 194-A, Chicago Zoning Ordinance):

"194-A-15 (Section 15) Ground area of buildings."

* * * * * * *

"In the 3rd and 4th Volume districts, the maximum ground area of all buildings, exclusive of garage, is 60 per cent of the area of a corner lot and 50 per cent of the area of any other lot, piece or parcel in Apartment House districts."

"194-A-18 (Section 18) Building lines."

* * * * * * *

"(b) No part of the ground area of any building in an Apartment House district shall be nearer to the front street line than a distance equal to 10 per cent of the average depth of all lots, pieces or parcels in such use district fronting in the block in which the building is located.

(c) No part of the ground area of any building containing one or more apartments in Family Residence, Duplex Residence, Group House, Apartment House or Specialty Shop districts shall be nearer to the rear lot line than 20 feet."

Respondents Lake Shore Club and Lakefront Realty propose to build a garage facing on E. Chestnut St. and with its vehicle entrances and exits into that street (photographs, abs. 76); its front line would be 146 feet along Chestnut St., it would extend back for a depth of 121 feet; it would not have any 10% front line setback or any 20 feet rear line setback; it would occupy the whole of the ground area, 17,672 square feet (sketch, abs. 62). The structure would be 2 stories below ground, 4 floors above, and would have a capacity for 268 automobiles. The zoning ordinance prohibits public garages

in this area; respondents seek to avoid the prohibition by contending that the garage would be used to provide parking facilities for its adjacent 18-story club house. E. Chestnut St. which extends in an east and west direction, intersects with N. Lake Shore Drive, which extends in a northerly and southerly direction; the point of intersection is approximately 267 feet east of the east line of the proposed garage. Respondent's club house, built many years ago, faces on N. Lake Shore Drive.

The Commissioner denied the building permit because the structure would violate the zoning ordinance requirements as to front line setback and as to intensity of lot area. Lake Shore, pursuant to the Illinois Statute, made application to the zoning board for a variation from the zoning ordinance requirements as to front line setback and ground area of the building. The state statute provides that a public hearing shall be had on such application, preceded by publication of notice, containing a description of the location and of the proposed variation (Art. 73-4, Appendix B). The record contains the notice (abs. add. p. 181); the notice refers to an application for a zoning variation; it does not refer to an appeal from the Commissioner's decision.

222 East Chestnut Street Corporation, petitioner, is owner of a 19 story unfurnished apartment building with a gross annual rental of over $120,000, situated on the north side of E. Chestnut St., 293 feet obliquely across the street from the proposed structure. On the opposite page, as an Argumentative Exhibit for petitioner, is a sketch showing the location and dimensions of the proposed garage and its distances from petitioner's property and from N. Lake Shore Drive respectively. Petitioner appeared at the hearing before

N. LAKE SHORE DR.
367'-8 7/8"
408'-8 5/8"
VEHICLE ENTRANCE AND EXIT
PROPOSED GARAGE FOR 268 CARS
121'-4"
100'
N
N DEWITT PL
24'
E. CHESTNUT ST.
E. PEARSON ST
PETITIONER BUILDING
NO. 222
ARGUMENTATIVE EXHIBIT
SCALE: 1"=100'

the Board, cross examined respondents' witnesses and otherwise participated. At the hearings before the Board, no objection was made by respondents (or anyone else) as to petitioner's right to participate.

B. Emmet Hartnett was one of the five members of the Zoning Board; he sat at the two hearings—that of October 25, 1955 and that of November 1, 1955. He not only sat at the hearings, but he took an active part. When applicant's witness Stanton was on the stand, Hartnett asked the witness,

> Q. "Didn't you express an opinion that if any setback were required, it would be necessary to go into a mechanically operated facility something like twelve stories in height?"
>
> A. "You could do this with a mechanically operated facility but you couldn't do it with a ramp garage."
>
> Q. "You said that would run about twelve stories in height."
>
> A. "Something like that." (abs. 108, 109)

This incident warrants two inferences: (i) that Hartnett was acting as advocate for respondent, pursuant to the fact that at that time (unknown to petitioner) he was the club president, and (ii) that Hartnett had been present at some talk with the witness outside of the hearing, at which Hartnett elicited information from the witness, which information Hartnett was now impressing on his fellow Board members.

The decision of the Board was given under date of December 6, 1955; Hartnett is shown as not voting (abs. 64). The record does not show anything further; there is no memorandum that Hartnett had ever disqualified or recused himself.

Hartnett's connection with Lake Shore Club did not come out until after the hearings had been completed,

when Hartnett (as president of Lake Shore Club) wrote a circular letter to the club members (Annex E of complaint, abs. 36-39) in which he stated, "It is hoped that the Zoning Board will approve our plan for the garage, but we need to do our best by exchange of views to satisfy the opposition of one nearby property owner who objects." (abs. 38)

After the conclusion of the public hearing on November 1, 1955 and before its decision, the Board allowed applicant to submit to it documentary evidence without the knowledge of petitioner, and without petitioner having any opportunity to cross examine or rebut. The documents which the Board received and considered, but which were never offered in evidence and as to which petitioner had no opportunity to inspect, consider, cross examine and rebut were: (i) a letter to the Board from applicant's attorneys, dated November 3, 1955 (two days after the close of the hearing) (abs. 52, 53); (ii) a sketch (abst. 62); (iii) a photograph (abs. 76); (iv) floor plans (abst. 77, 78, 79); (v) a survey (abs. 115).

The Board's decision (abs. 64-75) was in the alternative: 1st, the Board found that no variation was necessary, because the proposed structure was permissible under the Board's construction of the zoning ordinance (par. 10, abs. 73). The Board's decision was that the 10 foot front line requirement did not apply on Chestnut St. because, although the lot faced on Chestnut St. and the car entrance and exit to the garage would be on Chestnut St., the lots should be considered as part of a large tract facing east on N. Lake Shore Drive, so that the *front* of the garage site should be regarded as on Lake Shore Drive, and Chestnut St. merely a side line. 2nd, "in the alternative" the Board found that if this construction of the zoning ordinance was erroneous, a variation should be allowed (abs. 73-75).

Petitioner filed complaint for administrative review in the lower state court (abs. 1-16) alleging that the action of the Board was erroneous, and illegal and constituted a violation of due process, contrary to the provisions of the Illinois and United States constitutions. The complaint set up the recently discovered conflict of interest and prejudice on the part of Hartnett and alleged that this (and other matters therein alleged) constituted a denial of due process. Hartnett and the other Board members were made parties in this suit, both individually and as board members; neither Hartnett nor any other member appeared therein or vouchsafed any explanation of when, if ever, Hartnett ceased to participate in the hearing and deliberation of the case. Respondents (defendants there) severally filed written motions to strike and dismiss the complaint (abs. 44, 45, abs. 46, 47) which motions were argued and denied (abs. 48); respondents then severally filed answers (abs. 116-121, abs. 121-128). Petitioner (plaintiff there) by leave of court, filed replies to said answers (abs. 130, 131). Petitioner also filed a motion to delete from the Board record, the documents and statements offered after the conclusions of the hearing and without petitioner's having an opportunity to inspect, consider, cross examine and rebut (abs. 166, 167); this motion was denied by the trial court in his oral opinion (abs. 153) and in the formal judgment order (abs. 134). The court considered the matter solely on the pleadings, the record of the Board, and the arguments of counsel; no additional evidence was heard. Petitioner participated in the proceeding without objection from anyone that petitioner was not a proper party to bring administrative review.

The trial court rendered an oral opinion (abs. 146-155) affirming the Board; formal judgment was entered ac-

cordingly (abs. 131-135). The judgment approves the finding of the Board that the proposed structure would be a permitted use (par. 3, abs. 132, 133), and adds (par. 5, abs. 133) that the grant by the Board of a variation "was not essential to the validity of the decision of the Board of Appeals finding that the proposed use was a permitted use and may be disregarded on appeal as surplusage."

Petitioner appealed to the state supreme court raising the federal question, the denial of due process. In the state supreme court, respondents confirmed their abandonment of any theory of a zoning variation, and defended on the sole ground that the proposed structure was a "permitted use" under a proper construction of the zoning ordinance, so that no variation was required; defendants' brief read (point I, def. brief 6, pp. 10):

> "The basic and legally effective finding by the Chicago Board of Appeals was that the proposed club garage was a Permitted Use in an Apartment District. Any other language in the Board's finding was not essential to that opinion, and may be disregarded as surplusage on appeal."

The issue before the state supreme court, therefore, was not the propriety or legality of the zoning variation, but whether the hearing had been in accordance with due process, and what was the proper construction of the zoning ordinance.

The case was docketed in the state supreme court as docket No. 34074. Some time subsequent thereto, another appeal, *222* v. *Board of Appeals* was filed and was docketed there as No. 34210; this second case involved a zoning variation in another block and did not involve the federal question, the denial of due process, involved in the instant case. Also, this second case did not in-

volve the abandonment of the zoning variation and the reliance on "permitted use", as in the instant case. Ordinarily, the state court would have decided the cases in the order of docketing, and the earlier case, docket No. 34074 would have been decided first. But the state court reversed this order of procedure; it handed down an opinion in the second case, docket No. 34210, holding that plaintiff had no right of administrative review of a zoning variation because its property fronted on a different street from defendant's property and no specific damage had been shown; and then the court handed down the same day in the instant case, an opinion that the plaintiff here had no right of administrative review *(erroneously treating this case as a zoning variation one)* and cited as authority its own contemporaneous opinion in No. 34210.

The state court (Case No. 34074) 10 Ill. 2d 130, Appendix A, declined to pass on the merits or on the constitutional questions, saying (p. 131):

> "Eight grounds for reversal are asserted, including constitutional objections which permit of a direct appeal to this court. However, there is one controlling point, the question of the plaintiff's interest or standing to maintain the action."

The court's opinion cited *222 East Chestnut Street Corporation* v. *Board of Appeals,* No. 34210 (10 Ill. 2d. 132) decided the same day, which concluded (p. 136):

> "In view of such conclusion, the constitutional and other contentions made by the plaintiff, although argued extensively, need not be considered."

In the instant case, the state supreme court did not pass on, did not refer to the federal question of the denial of due process; the court did not pass on, did not refer to the merits of petitioner's position.

In 1953, the Illinois Legislature had amended the Zoning Act to provide that "any owner or tenant of real property in the same contiguous zoning district . . . in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction," etc. in violation of zoning regulations. The amendment had been held valid by the state court in *Pasfield* v. *Donovan*, 7 Ill. 2d 563 (1956). Petitioner cited this amendment as an expression of Illinois public policy on the right of plaintiff to sue. The state court held, without any special analysis, that the amendment related to the right to bring injunction suits but not to the right for administrative review.

The stage in the proceedings in the court of first instance and in the appellate court, and the manner and method, in which the federal questions sought to be reviewed were raised.

Attached hereto, marked **Appendix C**, is a memorandum on the above points. It will appear therefrom that the federal questions were raised as follows:

(i) *The denial of due process by reason of the fact that Hartnett, a member of the Zoning Board, was also president of applicant Lake Shore Club*: by allegations in the complaint for administrative review, by propositions of law to the trial court, by points in the brief before the state supreme court.

(ii) *The denial of due process by reason of the fact that the board considered documents or statements not offered in evidence and as to which petitioner had no opportunity to inspect, consider, cross examine and rebut*: by allegations in the complaint for administrative review, by propositions of law to the trial court, by points in the brief before the state supreme court.

(iii) *The denial of due process by reason of the fact that the board passed on an issue (namely the correctness of the Commissioner's ruling) which was not included in the statutory publication notice and was not legally before it*: by allegations in the complaint for administrative review, by propositions of law to the trial court, by points in the brief before the state supreme court.

The judgment of the trial court (abs. 131-135) contains (par. 2, abs. 132) a general finding that petitioner was not deprived of its property without due process of law, but makes no reference to the specific points made by petitioner as to denial of due process; the antecedent oral opinion of the court (abs. 146-155) makes no reference even generally to any federal question or to petitioner's claim of denial of due process. The opinion of the state court neither passes on, nor refers to, the federal questions.

The copy of the judgment of the court below.

In **Appendix D** hereto is a copy of the judgment of the state supreme court and of its order denying petition for rehearing of the petitioner herein.

ARGUMENT.

We earnestly submit that this Court should grant a review on writ of certiorari because the state court has denied or failed to recognize a substantial federal right —namely the right to due process—in the hearings of a state administrative agency.

1. On petition for certiorari to review a judgment of a state court as denying or not duly recognizing a federal right set up therein, it is the Supreme Court's power to inquire, not only whether said right was denied in direct terms, but also whether it was denied in substance and in effect, by interposing a non-federal ground of decision without fair support.

Broad River Power Company v. *South Carolina,* 281 U.S. 537:

> (p. 540) "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. *Fox River Paper Co.* v. *Railroad Commission of Wisconsin,* 274 U.S. 651, 655. *Ward* v. *Love County,* 253 U.S. 17, 22, *Enterprise Irrigation District* v. *Canal Co.,* 243 U.S. 157, 164."

The state supreme court, in its opinion here, avoided the federal question raised by petitioner, that there had been a denial of due process in the administrative proceeding; the court affirmed the lower court on the sole ground that

petitioner had not proved any actual damage and therefore was not a proper party. As we shall now show, this ruling overlooked or disregarded so many points, that it must be regarded as not having a substantial basis, and as being an intentional avoidance of the federal question.

a. The state court opinion disregarded two important points: (i) the record here presents — not an issue of a zoning variation as the opinion states — but an issue of the violation of an existing zoning regulation; and (ii) consequently, even under the court's narrow construction of the state statute, petitioner was a proper party to bring administrative review.

Petitioner had cited before the state court, the state statute Ill. Rev. Stat. 1955, Article 73-9, providing that " . . . any owner or tenant of real property in the same contiguous zoning district, . . ., in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction," etc. The court held, however, that this section does not apply because the issue here is the propriety of granting a variation; see the court's language 10 Ill. 2d 132, citing 10 Ill. 2d 132, which latter opinion said (p. 135) "The fact that the zoning statute purports to confer upon qualified owners a right to bring suit for violation does not answer the question presented here, however, which concerns the propriety of granting a variation rather than mere enforcement." But the court in its opinion is clearly in error as to the nature of the issue here. It is true that the matter was started by Lake Shore as an application for a zoning variation; but during the progress of the litigation, the issue changed; first, the Board in its decision decided that, as a matter of construction of the zoning regulation, the proposed garage was a "permitted use" and that no variation was necessary (par. 10, abs.

73); but that "in the alternative" if the Board's construction was not correct, then the variation should be allowed (abs. 73-75). But in the trial court, respondents elected to abandon any "zoning variation" theory (which petitioner was there attacking) and to take their stand solely on the ground of "permitted use", that no variation was necessary and that any variation finding should be rejected as surplusage; see respondents' answer, par. 9 (abs. 125), the formal judgment order, par. 4, 5 (abs. 133, 134); and the quotation above from respondents' brief before the state supreme court.

Petitioner contends the statutory section Art. 73-9 is broad enough to enable "any owner or tenant in the same continguous zoning district . . . in addition to other remedies," to bring an action to *review a zoning variation*, and that the state court was wrong in its narrow construction, limiting the "owner or tenant" to actions to *prevent violations;* but petitioner contends further that, even if the state court's narrow construction were correct, its conclusion disqualifying petitioner here would not follow. This proceeding, because of respondents' abandonment of the variation theory, has become and is, a proceeding to prevent a *violation* of an "existing zoning regulation", which, in turn, involves the issue of the proper construction of the "existing zoning regulation"; the question of a "zoning variation" has been eliminated from the case by respondents' own election. Therefore Art. 73-9, even under the state court's narrow construction, *would apply.*

b. Even if the state court were right in regarding the issue as one of the propriety of a zoning variation — its holding that petitioner was disqualified from bringing suit, would still have no substantial basis.

(i) **The state court's opinion disregards the objectives of the zoning regulations.** The opinion states: "Here, the plaintiff's building is 293 feet distant, and there

is neither evidence nor presumption to show an adverse effect on the plaintiff by the proposed structure in regard to light and air, traffic congestion, or real estate values." This language overlooks the fact that the proposed garage structure, occupying the whole of the lot area, for a height of 4 floors, containing stalls for 268 cars, with its entrance and exit on Chestnut Street, will certainly increase street congestion and air pollution, and will probably increase the fire hazard, contrary to the express objectives of the Illinois enabling act, Ill. Rev. St. 1955, Ch. 24, Art. 73-1, Appendix B hereto.

Can it be fairly said that petitioner with a 19 story apartment building having a gross annual rent of over $120,000 and situated in the same street less than 300 feet away, has no interest in opposing such a radical change in the neighborhood or will suffer no damage if the change is allowed? True, the amount of such damage may be hard to prove mathematically, but such damage will nonetheless arise.

The courts of other jurisdictions, with substantial unanimity, have held that a neighboring property owner—without making any showing of special damage—has a right to bring action to oppose an application for a zoning variation: (Conn. 1951) *Hutchinson* v. *Board of Zoning Appeals,* 138 Conn. 247, 83 A. 2d 201; (Conn. 1953) *Heady* v. *Zoning Board,* 139 Conn. 463, 94 A. 2d 789; (Maryland 1948) *Mayor and City Council of Baltimore* v. *Byrd,* 191 Md. 632, 62 A. 2d 588; (Mass. 1952) *Sunderland* v. *Building Inspector,* 328 Mass. 638, 105 N.E. 2d 471; (Mass. 1956) *Spaulding* v. *Board of Appeals,* ..... Mass. ....., 138 N.E. 2d 367; (New Jersey, 1949) *Lacey* v. *Zoning Board,* 4 N.J. Super, 422, 67 A. 2d 466; (New York, 1950), *Clark* v. *Board of Zoning Appeals,* 301 N.Y. 86, 89, 92 N.E. 2d 903; (New York, 1954) *Bayport Civic Assn.* v. *Koehler,*

138 N.Y.S. 2d 524; (Rhode Island, 1951) *Abbott* v. *Zoning Board,* 78 R.I. 84, 79 A. 2d 620.

(ii) The state court's opinion disregarded the fact that the state court itself had repeatedly recognized the right of a property owner in the vicinity to bring action for administrative review of a zoning variation, without any showing of special damage.

See *Michigan-Lake Bldg. Corp.* v. *Hamilton,* 340 Ill. 284, 289, 292 (1930): *Welton* v. *Hamilton,* 344 Ill. 82 (1931); *Lindburg* v. *Zoning Board,* 8 Ill. 2d 254 (1956), (on objection by "owners of property in the vicinity" (p. 354) zoning variation allowing remodelling of residences into Apartment Buildings was reversed).

Winston v. *Zoning Board,* 407 Ill. 588 (1951) the only case cited by the state court, is distinguishable for several reasons: (a) as pointed out in *Winston**, there was no allegation there how near plaintiff's properties were to defendant's property or whether the value of plaintiff's properties was affected. (b) defendants in *Winston* made a motion in the trial court to dismiss on this ground, and on the further ground that necessary parties had not been made defendants, (c) *Winston* was decided in 1951, before *Lindburg* (1956), and if there is any conflict, *Lindburg* should prevail. (d) Respondents have abandoned any theory of a legally justified variation, and are relying entirely on the theory that the proposed garage will be a "permitted use"—which makes the case essentially different from *Winston,* and subject to Art. 73-9 of the state statute, even under the state court's narrow construction of that section.

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* The court said (p. 594):
"For all that appears in the complaint, plaintiffs' properties may be a mile or more from Silberstein's land, in part of the incorporated area of the county, not subject to the county zoning ordinance, and enhanced in value as the result of the decision of the zoning board."

(iii) The point that no special damage had been proved and petitioner had not established its rights as a proper party, had not been raised either before the Board or the court below; if it had been raised there, petitioner could have met it by introducing a showing of actual damage. Under the previous decisions of the state court, such a point, therefore, could not be first raised on appeal.

Petitioner had participated in the hearings before the Board, cross examined witnesses, submitted arguments—all without objection. At the conclusion of the Board hearings, the chairman had further recognized petitioner's status as a proper party by giving petitioner's counsel additional time to present a memorandum (abs. 114); the Board's decision specifically takes up and rules on certain of petitioner's objections (abs. 69, 70). Petitioner had filed the instant proceeding for administrative review. Respondents severally filed motions to dismiss; after argument, the trial court overruled both motions and ruled respondents to answer (abs. 48). The court's oral opinion (abs. 146-155) recognizes petitioner's status as a proper party and deals with certain of petitioner's contentions; the formal judgment order (abs. 131-135) also expressly recognizes petitioner's status. Subsequently petitioner presented a motion to the trial court to fix the amount of the appeal bond, and after a colloquy between the court and counsel (abs. 158-166), the court fixed the appeal bond in the sum of $15,000. It is of significance that in this colloquy, the court again expressly recognizes the right of petitioner to sue for administrative review without any showing of specific damage. The court (abs. 162): "I don't think you have a chance of going out of business, because I am very sincere in feeling your building isn't damaged or your people are not damaged." Mr. Macie: "It isn't necessary to show that under the statutes." The Court, "No, but that might affect the question of the

appeal bond. I am not saying it is necessary. It is interesting, I will say that." It appears, therefore, that no point was made in the trial court that petitioner was not a proper party to bring action for administrative review, in fact the trial court specifically recognized petitioner's right to bring such action.

Independently of its lack of merit, the point not having been raised below, could not be raised on appeal; such is the ruling in numerous decisions of the state supreme court, *e.g. Blanchard* v. *Lewis*, 414 Ill. 515; *In re Estate of Leichtenberg*, 7 Ill. 2d 545, 548.

(iv) The order of disposition of the cases in the state court.

Petitioner's contention that the state court declined to recognize a federal right, by interposing an unsubstantial, non-federal ground of decision is, we believe, supported by the sequence in which the state court disposed of the instant case, No. 34074, and the later companion case, No. 34210. The instant case presented several alleged denials of due process, *e.g.* (a) the conflict of interest and prejudice of the Board member Hartnett; (b) the receipt of evidence after the close of the hearing; (c) the lack of proper legal notice and therefore of jurisdiction to review the Commissioner's ruling denying the building permit. The issue in the instant case, namely the legality of the "permitted use" (involving in turn the proper construction of the zoning ordinance) was essentially different from the issue in the other case (No. 34210), the propriety of the zoning variation. The instant case was docketed first, and was first on the state court term agenda; but the court departed from the customary order and decided first, No. 34210, the case concerning the property in another block, involving an essentially different issue and not presenting the present federal question; and then the court

decided the instant case, relying on its opinion in No. 34210. We submit that the inference is fair, indeed unavoidable, that the state court was putting its decision in the instant case on an unsubstantial non-federal ground, in order to avoid passing on the federal question of substance here presented.

(v) The cumulative effect of these matters.

Each of the above matters in persuasive that the state court has denied petitioner's right to due process by interposing a non-federal ground of no substance. But while each alone is persuasive, the cumulative effect is conclusive; particularly this is so when—as we shall show—the specific violations here of due process have all been condemned by the same state court in its previous decisions.

2. It was a denial of due process for the Zoning Board to hear this matter with Hartnett participating.

As noted, Hartnett, one of the members of the Zoning Board, was also president of the applicant Lake Shore Club—which connection was not disclosed until after the Board hearings had been concluded. Hartnett, therefore, had two roles in the instant proceeding: on the one hand (*openly*) he was a member of the Board, a trustee for the public; on the other hand (*secretly*) he was president of applicant, a vitally interested party. Hartnett not only sat in the Board hearings, he took an active part. For example, at one hearing (abs. 108) Stanton, the witness for respondent, seemingly did not cover a point to Hartnett's satisfaction, so Hartnett asked him if he, the witness, had not made a certain statement, *presumably in Hartnett's presence outside the hearing,* to the effect that if a setback were required it would be necessary to have a mechanically operated facility twelve

stories high, and this witness admitted he had made such statement. (abs. 108, 109).* While the decision (abs. 64) does not show Hartnett as voting,** he was present at both the hearings and there is nothing in the record that thereafter he ever recused himself.*** He and the other Board members were made defendants to this suit for administrative review; neither he nor they offered any evidence or explanation as to when, if ever, he withdrew.

Tumey v. *Ohio,* 273 U.S. 510 is in point. Under the state statute there, an offense against state prohibition involving a wide range of fines enforceable by imprisonment, might be tried without a jury before the mayor of any rural village situated in the county in which offenses occurred; his judgment upon the facts was final and conclusive unless so clearly unsupported as to indicate mistake, bias or wilful disregard of duty; the fines were to be divided between the state and village; in addition to

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* In the circular letter dated November 23, 1955, written by Hartnett as president of Lake Shore to the club members, (Annex E to Complaint, abs. 36-39), is contained this language: (abs. 38) "It is hoped that the Zoning Board will approve our plan for the garage, but we need to do our best in exchange of views to try to satisfy the opposition of one nearby property owner who objects." At the time this letter was written, the proofs had been closed by the Board and the matter was under advisement by the Board, as Hartnett, a member of the Board, well knew.

** The state statute, Ill. Rev. Stat. 1955, Chap. 24, Art. 73-3 (C), provides: "The board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating that fact, * * *." Contrary to the statutory direction, the record (Abst. 64) does not indicate whether Hartnett was "absent" or whether he was "failing to vote."

*** The state statute, Ill. Rev. Stat. 1955, Chap. 24, Art. 73-3 (E), provides that the concurring vote of four members of the board is necessary for the reversal of any action of an administrative official, or for the allowance of any variation; this provision destroys any possible claim that Hartnett's participation was "by necessity."

his salary the mayor when he convicted, but not otherwise, received his fees and costs amounting to a substantial income; the fines offered a means of adding materially to the financial prosperity of the village, for which the mayor in his executive capacity was responsible. This court held that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided. The court held that the procedure there was violative of the due process clause of the Fourteenth Amendment and reversed the judgment of the state supreme court.

See also *In re Murchison, et al,* 349 U.S. 133

> (p. 136): "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 14."

The state supreme court here has decided in other cases, that a litigant is entitled to appear before an impartial tribunal, and that, absent such a tribunal, there is a

denial of due process. *Commissioners of Drainage* v. *Smith,* 233 Ill. 417 (1908) (pp. 425, 426) "A statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member, makes his adversary his judge and does not afford due process of law."; *City of Naperville* v. *Wehrle,* 340 Ill. 579 (1930). (where the lands of a school district are among those assessed for a local improvement, the secretary of the School Board who received compensation for services in such capacity, is neither a "competent" nor "disinterested" person to act as commissioner to spread the assessment within the meaning of the statute, and the incompetency of such commissioner renders voidable the action of the entire body, citing *R. I. R.R. Co.* v. *Lynch,* 23 Ill. 597 (1860), where the court says (p. 598) "It is no answer to say, the report of the commissioners need not be like the verdict of a jury, unanimous"). See also *Smith* v. *Department of Registration, etc.,* 412 Ill. 332, 343 (1952).

In re Heirich, 10 Ill. 2d 357 (opinion filed June 15, 1956 —rehearing denied March 20, 1957) is a recent case in which the state court explicitly and vigorously laid down the rule that no man who has a personal interest in the subject matter of a decision may sit in judgment in the case. The court cited *Smith* v. *Department of Registration and Education,* 412 Ill. 332, and concluded:

> (p. 385) "For the guidance of this court's commissioners in future cases and of all other persons required to find facts or apply law in adversary proceedings, judicial or administrative, we hold that when such an arbiter has a financial interest in the subject matter, even though he personally be a man of the most fastidious probity, it is his duty to recuse himself. He must do so if challenged."

In spite of the rule so plainly laid down, the court, when presented with Hartnett's flagrant conflict of interest,

avoided the issue and put its decision on the baseless ground that petitioner was not a proper party to sue.

It can be no answer that petitioner did not raise the objection at the Board hearing, because petitioner (see its complaint, par. 11(a), abs. 7) did not learn of Hartnett's connection with respondent club *until after the Board hearings had been completed.* But, of course, Hartnett at the time he sat as a Board member knew that he, Hartnett, was president of respondent, and his principal Lake Shore Club should not be allowed to profit or derive any advantage from Hartnett's breach of his public trust.

Barbara Realty Company v. *Zoning Board of Review,* 128 A. 2d 342 ..... R. I. ..... (Jan. 10, 1957) involved an issue of board member prejudice in a zoning variation case. Some time before the application there, a member of that board had indicated in a casual conversation that he favored an amendment of the city ordinance to permit the construction applied for. The Supreme Court of Rhode Island held that this statement had disqualified him as an impartial official, and quashed the board's decision.

Once the tribunal has been revealed as prejudiced, the law does not require showing of any particular incidence of the prejudice. But, if such showing were required, the record here would furnish it. For example: the zoning ordinance provides for a front line setback of 10% of the lot depth. The garage tract here abuts only on one street, Chestnut St.; the vehicle entrance and exit of the proposed garage are on Chestnut St.; and Chestnut St. is obviously the front line of the tract. When respondent presented an application for a building permit for a structure to extend to the street line instead of set back 12 feet (10% of the tract depth), the Commis-

sioner denied the permit (abs. 50), for the reason, among others, that the absence of setback was not in conformity with the zoning ordinance. But in the present proceeding, the Board has decided that the Commissioner was wrong and that the proposed garage—without any front line setback and built up to the street line—would be a "permitted use" under a proper construction of the ordinance. And how did the Board attempt to support this astounding conclusion? By arguing that in spite of the fact that the garage tract abuts on Chestnut St. and on no other street, in spite of the fact that the vehicle entrance and exit of the garage will be on Chestnut St., that nevertheless the real front line of the garage tract is not on Chestnut St. but is on N. Lake Shore Drive, 267 feet distant from the closest line of the garage tract! An examination of the sketch, Argumentative Exhibit, P. 7, above will establish the unreality of such an argument. It is only reasonable to conclude that such a violent wrenching of the meaning of language was caused by the obvious wish of the Board to help their fellow member Hartnett obtain the favorable ruling to which in his circular letter to the club members (Annex E, Abs. 36-39) he had referred to hopefully (Abs. 38).

3. It was a denial of due process for the Board to receive or consider evidence which was not presented at open hearing, and as to which petitioner had no opportunity to inspect, consider and cross examine witnesses or offer evidence in explanation or rebuttal.

The hearings were concluded and the case taken under advisement on Nov. 1, 1955 (abs. 114). Two days thereafter, respondent's attorneys wrote the Board a letter giving the alleged legal description of the entire club property; at some other undisclosed date after the close of the hearings, respondent furnished the Board with a sketch of the proposed garage location (abs. 62), a

photograph (abs. 76), floor plans (abs. 77, 78, 79), a survey (abs. 115). None of these documents was submitted at the hearing; as to none did petitioner have a right to inspect, consider, cross examine or rebut. The Board in its decision (particularly par. 7, abs. 70, 71) relied on the documents and, based upon them, concluded that the front line of the proposed garage would not be E. Chestnut Street and therefore subject to any setback. If these documents had been submitted at open hearing, petitioner could have dealt with this theory and cross-examined and introduced rebuttal. As it was, petitioner was deprived of these rights.

But there was more. Not only did the Board in its consideration of the case (after the closing of proofs and without the knowledge of petitioner) receive these documents that had never been offered in evidence, but it is obvious that Hartnett (and probably the other members of the Board) were informed of, and gave consideration to, statements made by a witness outside of the hearing and outside of the presence of petitioner. No other meaning can be given to the colloquy between the witness Stanton and the Board member Hartnett. (abs. 108, 109) Mr. Hartnett: "I want to ask Mr. Stanton a question. Didn't you express an opinion that if any setback were required it would be necessary to go into a mechanically operated facility, something like twelve stories in height?" A. "You could do this with a mechanically operated facility but you couldn't do it with a ramp garage." Mr. Hartnett: "You said that would mean about twelve stories in height?" A. "Something like that."

First, it was a denial of due process for the Board, with Hartnett as a member, to hear the application of Lake Shore Club of which Hartnett was president; sec-

ond, it was also a denial of due process for the Board to consider any evidence received outside of the hearing. But *a fortiori,* it was denial of due process, a compounding of the previous violations, for Hartnett, as member of the Board with a conflicting interest, to receive evidence outside the hearing from respondent's witness.

The state court, in a long line of decisions, has held that an administrative agency must act only on evidence presented in the case, with an opportunity to all parties to know, to inspect, to consider, to cross examine, to rebut. See *C. & E. I. Ry. Co.* v. *Commerce Commission,* 341 Ill. 277 (1930); *Smith* v. *Department of Registration,* 412 Ill. 332, 347, 348 (1952); *Flick* v. *Gately,* 328 Ill. App. 81 (1946).

In *Morgan* v. *U. S.,* 298 U. S. 468, 480, this Court laid down a definition of "due process" that has been often cited:

> "There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States* v. *Abilene & Southern Ry. Co., supra,* (265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016). Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extraneous considerations which

in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.".

We submit that there is a vast gulf between this noble concept of what "due process" requires, and the sorry record here disclosed.

4. It was a denial of due process for the Board to hear the case on an issue that was not properly before it.

As noted, the Board's decision was in two parts: 1st, (abs. 64-73), that as a matter of construction of the zoning ordinance, the applicant has a right to erect the structure in question, and that the Commissioner erred in denying applicant a building permit; 2d, in the alternative (abs. 73-75), that if the proper construction of the zoning ordinance did not authorize a permit, then a variation should be granted. Respondents, however, subsequently abandoned the 2d alternative, the "zoning variation," and based their case solely on the theory of a "permtted use"; (respondent's answer, par. 9, abs. 125; judgment order, par. 5, abs. 133, 134; the quotation above from respondents' brief in state court). So the state court had before it only the one issue: was the action of the Board in reversing the Commissioner, in conformity with due process and otherwise free from error?

The statutory notice on which the Board heard the matter (add. abs. p. 181) specifically set out that the matter was to be heard on "an application for a zoning variation"; the proceedings before the Board were entitled as "an application for a zoning variation" (abs. 63, abs. 64); there was no notice ever given of any hear-

ing on an appeal from the Commissioner; therefore the Board's jurisdiction was confined to an "application for zoning variation", and the Board had no jurisdiction to hear an appeal; any attempt to do so was a violation of due process.

The state court has repeatedly held that unless there is sufficient notice in proper legal form and *advising defendant of the issues he must meet,* there is a failure of due process and the court lacks jurisdiction. *Northern Trust Co.* v. *Sanford,* 308 Ill. 381, 392 (1923), *Sheaff* v. *Spindler,* 339 Ill. 540, 555 (1930), *Lewis Drainage Dist.* v. *Melville,* 388 Ill. 526, 531, 532 (1945).

It is, we believe, self-evident that the statutory notice and the statements of the Board and the whole tenor of the record, demonstrate that the proceeding was not an appeal from the Commissioner's ruling but was an application for a zoning variation; that the Board after having conducted the hearing on this issue and having closed proof and taken the case under advisement, could not under the requirements of due process—without any notice to petitioner or any new publication to the public —shift the nature of the proceeding and convert it into an appeal.* Yet, it is on the legality of such a shift by the board that respondent's stand is based.

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*The action of the Board was unusual; it seems a fair inference that the Board members had made up their minds to authorize the disputed structure, and if the evidence was not sufficient to support a zoning variation under the state statute with its requirement that "practical hardship, etc." be shown (Art. 78-4), that the Board members were going to authorize the structure on some other basis. Again, we submit, it is not unreasonable to attribute some of the Board's zeal to the fact that Hartnett, one of the fellow members, was president of respondent club.

5. Under the state statute, great weight is attached to the findings and conclusions of the administrative agency on questions of fact; it is therefore particularly important that the hearing be conducted in accordance with due process.

The Illinois practice on administrative review is set out in the Administrative Review Act, Ill. Rev. Stat. 1955, Ch. 110, Section 264, et seq. Section 11 sets out the scope of the review (Ill. Rev. Stat. 1955, Ch. 110, Sec. 274):

> "Section 274 (11—*Scope of Review*) . . . No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct."

Since the statute makes the findings and conclusions of the agency prima facie true and correct, it is necessary that these findings and conclusions be arrived at in a proceeding with due process.

CONCLUSION.

We submit that the proceeding before the Board denied petitioner due process: (i) in that the president of the adverse party was allowed, as a member of the Board, to participate in the hearings; (ii) in that evidence was secretly and improperly received, which petitioner had no opportunity to inspect, consider, cross examine and rebut; (iii) in that the decision of the Board was based on an issue (which respondents contend is the only issue in the case) as to which no statutory notice had been given and on which there had been no hearing.

We contend that the state court, in an effort to avoid consideration of the federal question, placed its decision on an unsubstantial non-federal ground; that this ground disregarded the fact that the issue in the case was, not the propriety of a zoning variation, but the construction of the zoning ordinance; that this ground was contrary to the previous decisions of the state court and to the practically unanimous decisions of other reviewing courts; that this ground was not available here, because it had not been raised in the court below; that this ground was clearly lacking in substance.

Administrative tribunals continue to increase in number and scope; it is necessary that it be made plain that they must proceed in accord with due process, and that if they do not so proceed, their decisions cannot stand.

This case is important in the amounts involved; petitioner's apartment building, with a gross annual rental of over $120,000. is a valuable property; respondent's garage to house 268 automobiles will cost a large sum. But the case is also important in the legal question it raises, of the necessity for a state administrative agency to recognize a federal right and to observe due process in its proceedings.

The state supreme court has failed to recognize petitioner's federal right; this court is petitioner's last recourse.

Petitioner prays that its petition for writ of certiorari be granted.

Respectfully submitted,

JOSEPH F. ELWARD,
EDWARD S. MACIE,
Attorneys for Petitioner.

APPENDIX A.

The opinions of the Supreme Court of Illinois in the instant, and in a companion case:

Docket No. 34074—Agenda 36—September, 1956.

222 East Chestnut Street Corporation, Appellant, v. The Board of Appeals of the City of Chicago *et al.*, Appellees. (10 Ill. 2d 130.)

MR. JUSTICE HERSHEY delivered the opinion of the court:

This is an appeal from a judgment of the superior court of Cook County denying plaintiff's prayer to set aside the grant of a building permit by the Chicago Zoning Board of Appeals.

The property involved consists of three lots on the south side of East Chestnut Street in Chicago, on which the defendant Lake Shore Club, through its affiliate the Lake Shore Realty Corp., proposes to build a three-and-four-story, split-level garage, to provide parking facilities adjacent to its 18-story club building.

The plaintiff, 222 East Chestnut Street Corp., is the owner of a 19-story apartment building on the north side of East Chestnut Street, 293 feet obliquely across the street from the three lots in question. The plaintiff objects to the grant of the permit, alleging that the proposed structure would interfere with its light and air, congest traffic in the street, and reduce the value of its property.

Eight grounds for reversal are asserted, including constitutional objections which permit of a direct appeal to this court. However, there is one controlling point, the question of the plaintiff's interest or standing to maintain the action.

In *222 East Chestnut Street Corp.* v. *Board of Appeals*, No. 34210, decided this day, the same allegations of injury

are involved. We there hold that these allegations must be supported by evidence and are not made out by a mere showing that plaintiff's building was 184.5 feet from the proposed building and in the same contiguous zoning district. In short, mere proximity without proof of actual damage is not sufficient.

Here, the plaintiff's building is 293 feet distant, and there is neither evidence nor presumption to show an adverse effect on the plaintiff by the proposed structure in regard to light and air, traffic congestion, or real estate values. It is not a party "whose rights, privileges or duties were adversely affected by the decision" of the administrative agency, and it has no right to a review of the agency's determination. *Winston* v. *Zoning Board of Appeals,* 407 Ill. 588.

Finally, the plaintiff is not aided by section 73—9 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1955, chap. 24, par. 73—9,) providing that an action or proceeding to prevent a zoning violation may be instituted by the municipality or by an owner or tenant of real property in the same contiguous zoning district. See *222 East Chestnut Street Corp.* v. *Board of Appeals,* No. 34210.

For the reasons stated, the judgment below is affirmed.

Judgment affirmed.

Docket No. 34210—Agenda 55—September 1956.

222 East Chestnut Street Corporation, Appellant, v. The Board of Appeals of the City of Chicago *et al.*, Appellees. (10 Ill. 2d 132.)

Mr. Chief Justice Klingbiel delivered the opinion of the court:

On application of La Salle National Bank, the Chicago zoning board of appeals granted a variation from setback provisions of the zoning ordinance, permitting the bank, as trustee, to erect a proposed apartment building up to the front lot line. The 222 East Chestnut Street Corporation, owner of an existing apartment building situated in the same zoning district, thereafter brought an action in the superior court of Cook County under the Administrative Review Act (Ill. Rev. Stat. 1955, chap. 110, par. 264 *et seq.*) seeking to reverse the decision. The superior court, after hearing questions presented by the record, affirmed the board's decision and dismissed the complaint. Plaintiff appeals directly to this court on the ground that the validity of a statute is involved.

The lot upon which defendant bank desires to build is situated at the southeast corner of East Delaware Place and North DeWitt Place. It has a frontage of 95 feet west to east on East Delaware, and a depth of 110 feet from north to south on North DeWitt. The ordinance requires a setback of 10 per cent of the depth, or 11 feet in this case. The proposed apartment building is 23 stories in height with an attached garage at the rear having three stories and a basement. A 10-story apartment building on the adjoining lot to the east extends to its front lot line, which is the same line to which defendant bank desires to erect its building. The remaining building in the block is situated at its east end, and is separated from the 10-story

building by a vacant lot. This remaining building is, likewise, built to the Delaware street lot line.

The plaintiff, whose apartment building is located about 185 feet southwest of the subject property, appeared at the hearing before the board and objected to the granting of a variance. To reverse the judgment of the superior court plaintiff contends that insufficient notice was given of the application and hearing thereon; that the amendatory act of 1955 (Ill. Rev. Stat. 1955, chap. 24, par. 73—4,) is unconstitutional in several respects; that the decision of the board failed to contain sufficient findings of fact as required by the statute; that the decision of the board is not supported by the record; that the trial court erroneously refused to make findings of fact and to state propositions of law; and that the board erred in finding that the applicant could build to the rear line of the lot.

It is necessary at the outset, however, to consider the question whether the plaintiff has an interest sufficient to entitle it to maintain an action under the Administrative Review Act. The defendants insist that plaintiff is not affected by the decision and has no standing to bring the present action. The plaintiff contends, on the other hand, that any owner in the same zoning district has a right to bring proceedings for review, and that it is unnecessary to show any individual proof of damage. To maintain this position plaintiff relies on a 1953 amendment to the zoning statute declaring that an action or proceeding to prevent zoning violations may be instituted either by the municipality or by any owner or tenant of real property in the same contiguous zoning district as the building in question. (Ill. Rev. Stat. 1955, chap. 24, par. 73—9.) It is argued that this amendment "evinces a public policy of this State, that without any further showing, the owner of property shall be automatically entitled to bring suit for a zoning

violation anywhere in the zoning district where the property is located."

The fact that the zoning statute purports to confer upon qualified owners a right to bring suit for violation does not answer the question presented here, however, which concerns the propriety of granting a variation rather than mere enforcement. We have heretofore held that the right to review a final administrative decision is limited to those parties of record in the proceeding before the administrative agency "whose rights, privileges, or duties are affected by the decision." (*Winston* v. *Zoning Board of Appeals,* 407 Ill. 588.) In that case a variance had been granted for construction of a 40-unit apartment building on certain property classified in a "B" country home district of Peoria County. A complaint, filed under the Administrative Review Act by other property owners who were parties of record before the zoning board, alleged that they owned property in the vicinity of the premises involved and that the value and use of their property were affected by the granting of the variance. In affirming a judgment dismissing the complaint, this court held that to state a cause of action specific facts must be alleged showing that the plaintiffs were injured or damaged by the decision sought to be reviewed.

In the case at bar the complaint alleges that granting the variation would substantially injure plaintiff's property in that its light, air and fire protection would be interfered with, its "taxable value" would be diminished, and traffic congestion would be increased near and in front of it. The allegations were denied by defendants. In its brief plaintiff fails to show any evidence whatever to support them, nor have we found such support in the record. It sufficiently appears that plaintiff's apartment building is

situated in the same zoning district as the subject property, and that its northeast corner is 184.5 feet due west from the southwest corner of the subject property. But it fronts on a different street, and the variation in question permits the proposed building to be erected on the front lot line, or 11 feet farther north from plaintiff's apartment building than the setback line would be. There is nothing in the physical situation of the two properties to justify an inference that plaintiff's building would be damaged by the granting of the variation.

In its argument on the point plaintiff does not contend there is evidence that it would be injured. Indeed, the plaintiff's only witness, its vice-president, testified on cross-examination that the variation would adversely affect plaintiff's building only "because it might be a precedent for other variations in the neighboorhood," and that the allowance of this particular variation would not, of itself, have any adverse effect. The sole contention made, with respect to its standing to maintain the action, is that a showing of adverse effect is unnecessary if the two properties are in the same contiguous zoning district. We think such a contention cannot be sustained, and that under our decision in the *Winston case* it was incumbent upon plaintiff to allege and prove it would in fact be adversely affected by the board's decision. This it has failed to do.

In view of such conclusion the constitutional and other contentions made by the plaintiff, although argued extensively, need not be considered. The judgment of the superior court dismissing the action was correct and is hereby affirmed.

Judgment affirmed.

APPENDIX B.

The statutes involved.

ILL. REV. ST. 1955, CH. 24:

ARTICLE 73. SPECIAL POWERS—ZONING

§ 73-1. Objectives of article—Classification, regulation and location of uses, structures—Elimination of nonconforming uses, etc.)

To the end that adequate light, pure air, and safety from fire and other dangers may be secured; that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted, the corporate authorities in each municipality have the following powers:

(1) To regulate and limit the height and bulk of buildings hereafter to be erected; (2) to establish, regulate and limit the building or set-back lines on or along any street, traffic-way, drive or parkway; (3) to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; (4) to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential, and other uses; (5) to divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this article; (6) to fix standards to which buildings or structures therein shall conform; (7) to prohibit uses, buildings, or structures in-

compatible with the character of such districts; and (8) to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed under this article.

In all ordinances passed under the authority of this article, due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire municipality and the uses to which the property is devoted at the time of the enactment of such an ordinance. The powers conferred by this article shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted, but provisions may be made for the gradual elimination of uses, buildings and structures which are incompatible with the character of the districts in which they are made or located; including, without being limited thereto, provisions (a) for the elimination of such uses of unimproved lands or lot areas when the existing rights of the persons in possession thereof are terminated or when the uses to which they are devoted are discontinued; (b) for the elimination of uses to which such buildings and structures are devoted, if they are adaptable for permitted uses; and (c) for the elimination of such buildings and structures when they are destroyed or damaged in major part, or when they have reached the age fixed by the corporate authorities of the municipality as the normal useful life of such buildings or structures. As amended 1943, July 24, Laws 1943, vol. 1, p. 320, § 1.

§ 73-4. Enforcement officers—Board of Appeals.)

(a) In municipalities of 500,000 or more population, the regulations authorized by this Article may be varied in their application only by the board of appeals of the municipality, subject to the power of the corporate authorities to prohibit, in whole or in part, the granting of variations in respect to the classification, regulation and restriction of the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses. Variations shall be permitted by the board of appeals only when they are in harmony with the general purpose and intent of the regulations and only in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction, or alteration of buildings or structures or the use of land. In its consideration of the standards of practical difficulties or particular hardship, the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the three conditions enumerated. The corporate authorties may provide general or specific rules implementing, but not inconsistent with, the rules herein provided to govern determinations of the board of appeals. A decision of the board of appeals shall not be subject to review, reversal or modification by the corporate authorities but shall be judicially reviewable under the provisions of Section 73—1.01.

(b) In municipalities of less than 500,000 population, the regulations authorized by this Article may provide that the board of appeals or corporate authorities may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction, or alteration of buildings or structures or the use of land. If the authority to determine and approve variations is vested in the board of appeals it shall be exercised in accordance with the conditions prescribed in paragraph (a) of this Section, subject to the power of the corporate authorities to prohibit, in whole or in part, the granting of variations in respect to the classification, regulation and restriction of the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses. If the power to determine and approve variations is reserved to the corporate authorities, it shall be exercised only by the adoption of ordinances. However, no such variation shall be made by the corporate authorities as specified without a hearing before the board of appeals.

(c) No variation shall be made by the board of appeals in municipalities of 500,000 or more population or by ordinance in municipalities of lesser population except in a specific case and after a public hearing before the board of appeals of which there shall be a notice of the time and place of the hearing published at least once, not more than 30 nor less than 15 days before the hearing, in one or more newspapers published in the municipality, or, if no newspaper is published therein, then in one or more newspapers with a general circulation within the munic-

ipality; except that in municipalities with less than 500 population in which no newspaper is published, publication may be had by posting a notice in three prominent places within the municipality. This notice shall contain the particular location for which the variation is requested as well as a brief statement of what the proposed variation consists.

(d) In municipalities of less than 500,000 population, where a variation is to be made by ordinance, upon the report of the board of appeals, the corporate authorities, by ordinance, without further public hearing, may adopt any proposed variation or may refer it back to the board for further consideration, and any proposed variation which fails to receive the approval of the board of appeals shall not be passed except by the favorable vote of two-thirds of all aldermen or trustees of the municipality.

(e) Every variation, whether made by the board of appeals directly, or by an ordinance after a hearing before the board of appeals, shall be accompanied by findings of facts specifying the reason or reasons for making the variation.

The provisions of this amendatory act of 1955 shall not affect the validity of any variations approved by the corporate authorities or by a board of appeals and in force prior to its effective date. As amended 1955; June 30, Laws 1955, p. 674, § 1.

§ 73-5. Appeals to board of appeals.)

An appeal to the board of appeals may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality. The appeal shall be taken within such time as shall be prescribed by the board of

appeals by a general rule by filing with the officer from whom the appeal is taken and with the board of appeals a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In this event the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application and on notice to the officer from whom the appeal is taken, and on due cause shown.

The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties and decide the appeal within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises and to that end has all the powers of the officer from whom the appeal is taken.

§ 73-9. Proceedings to prevent violation.)

In case any building or structure is constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this

article, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building or structure in question, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. When any such action is instituted by an owner or tenant, notice of such action shall be served upon the municipality at the time suit is begun, by serving a copy of the complaint on the chief executive officer of the municipality, no such action may be maintained until such notice has been given.

In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes of this article.

If a permanent injunction is decreed in any action or proceeding for a purpose mentioned in this section, the court in its decree may, in its discretion, allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such. As amended 1953, June 24, Laws 1953, p. 431, § 1.

APPENDIX C.

Memorandum of the stage of the proceedings in the court of first instance, and in the appellate court in which the federal questions sought to be reviewed were raised:

---

a

(abs. 1-16) Complaint for Administrative Review by petitioner 222 East Chestnut Street Corporation:

(abst. 6) "11. (a) B. Emmet Hartnett is president of Lake Shore Club of Chicago and as such was and is actively interested in procuring such variation from the board of appeals, as will more fully appear from a photostatic copy of a letter dated November 23, 1955, and signed by said Hartnett and distributed to members of said Lake Shore Club of Chicago, a copy whereof is attached hereto, marked Annex "E" and expressly made a part hereof. Subsequently to November 23, 1955, the president of plaintiff saw a copy of said letter and learned for the first time of Hartnett's connection with said Lake Shore Club."

(abs. 7) "(b) Said Hartnett, the president of Lake Shore Club, is the same Hartnett who was a member of the board of appeals at the time Lakefront Realty Corporation filed said application for a zoning variation and continuously ever since has been and is now a member of said board of appeals. Said Hartnett therefore was and is subject to a distinct conflict of interest; on the one hand as president of Lake Shore Club he was an active proponent of said zoning variation so applied for by Lakefront Realty Corporation, the affiliate of the club; on the other hand, as member of the board of appeals, he was supposed to be impartial and have no interest except that of carrying out the law and protecting the interest of the public generally."

(abs. 7) "(c) Said Hartnett took part in said hearings on October 25, 1955 and November 1, 1955; on information and belief, said Hartnett took part in the hearing and consideration of said application and in the decision of the case; while the decision itself purportedly shows that Hartnett did not vote thereon, on information and belief: this is not a true recital of the facts of the matter, but the facts are that Hartnett did take an active part in the deliberation and the decision, * * *"

(abs. 9-10) "14. Plaintiff in the proceedings before the board of appeals has been deprived of its property without due process of law, in violation of the provisions of the Constitution of the State of Illinois, particularly (but not in limitation thereof) Article II, Section 2 and of the U. S. Constitution, particularly (but not in limitaton thereof) Amendment XIV, in the following (among other respects):"

"(a) Plaintiff had a right to have this application and plaintiff's objections thereto, heard and considered by an impartial board on which there would be no interested member; plaintiff was denied that right, inasmuch as said Hartnett having a distinct interest in the granting of said zoning variation, was a member of said board and took part in the hearings and deliberations."

. . .

(abs. 10) "(c) On information and belief, evidence was received or considered by the board of appeals that was not presented at open hearing."

"(d) On information and belief no sufficient notice of said application and the hearing thereon, was given as required by law."

* * *

(abs. 11) "(c) The matter came before the board of appeals on an application for a variation; it did not

come before the board of appeals on an appeal from the decision of the commissioner of buildings. The board of appeals had therefore jurisdiction to hear only the application for a variation and did not have jurisdiction to reverse the order of the commissioner of buildings."

b

During the pendency of this cause, petitioner 222, made a written motion to exclude evidence, as follows:

(abs. 166, 167): "Motion of plaintiff filed on February 28, 1956 to exclude certain evidence:

Now comes plaintiff by Edward S. Macie, its attorney, and moves the court that the court amend the Record of Proceedings before the Board of Appeals of the City of Chicago (filed herein by said Board of Appeals) by striking and deleting therefrom all documents and all statements whether written or verbal, not presented in evidence before said board, as to which plaintiff had no opportunity to inspect, consider, cross-examine witnesses or offer evidence in explanation or rebuttal."

(abs. 153) The trial court denied this motion:

"Mr. Macie: If the Court please, I would like a ruling on my motion to exclude the evidence that was not properly introduced.

"The Court: You have a motion striking certain documents and so forth?

"Mr. Macie: That is correct.

"The Court: I will deny that motion."

See also formal judgment order (abs. 134).

c

Petitioner, 222 presented the federal issues to the trial court by propositions of law:

(abs. 170) "1. It would be a violation of due process of law and illegal for the Board of Appeals to treat as evidence any documents or statements—whether verbal or written, which were not offered as such at the hearings before the board and as to which the adverse party had no opportunity to inspect, consider, cross-examine witnesses, and offer evidence in explanation or rebuttal."

(abs. 170) "2. It would be a violation of due process of law and illegal for the Board of Appeals to treat as evidence any documents or statements, whether verbal or written, relating to the legal description or title of the present Lake Shore Club improvements, or any other property, because same was not offered as evidence at the hearing before the board and because plaintiff had no opportunity to inspect, consider, cross-examine witnesses and offer evidence in explanation or rebuttal.

(abs. 171) "3. In the record filed in this court by the board of appeals, any documents or statements, whether verbal or written incorporated therein, which were not offered in evidence before the board or as to which plaintiff had no opportunity to inspect, consider, cross-examine witnesses or offer evidence in rebuttal—are not legally a part of such record and should be stricken and deleted from such record."

(abs. 173) "13. The fact that B. Emmet Hartnett, president of the Lake Shore Club, and as such an interested party, was a member of the Board of Appeals and took part in the proceedings of said board, precluded said Board of Appeals from being an impartial tribunal, and was in violation of due

process provisions in the Illinois constitution and U.S. constitution.

(abs. 174) "14. The fact that the Board of Appeals considered documents and statements, written and verbal, not presented in evidence at the hearing and as to which plaintiff did not have an opportunity to inspect, consider, cross-examine witnesses and offer evidence in explanation or rebuttal, was a violation of the due process provisions of the Illinois constitution and of the U. S. constitution.

(abs. 175) "15. The hearing before the Board of Appeals was conducted in violation of the due process provisions of the Illinois constitution and of the U.S. constitution, and said hearing and the decision and resolution of the Board of Appeals thereon were and are null and void."

The court refused to hold the propositions of law (abs. 153-154); see also formal judgment order (abs. 134).

d

In the brief of petitioner 222 before the Supreme Court of Illinois, the following points were raised:

(p. 10) "1. a) The Board of Appeals had no right to consider any document or statement (whether written or verbal) not presented in evidence before said Board and as to which plaintiff had no opportunity to inspect, consider and cross-examine witnesses or offer evidence in explanation or rebuttal."

"b) The Board here (as shown by its official record of proceedings and its decision) did consider documents and statements not offered in evidence."

"c) The motion of plaintiff before the trial court to amend the Board's record of proceedings by striking and deleting therefrom all documents and statements not offered in evidence, should have been sustained."

(pp. 11, 12) "3. The proceedings here before the Board deprived plaintiff of property without due process of law, in violation of the provisions of the Illinois constitution and the United States constitution."

"a) Plaintiff had a right to have the application and plaintiff's objections thereto, heard and considered by an impartial Board; plaintiff was denied that right, inasmuch as one Hartnett—having a distinct interest as president of Lake Shore Club in the granting of the zoning variation—was a member of the Board and took part in the hearings, examination and deliberations."

"b) Evidence was received or considered by the Board that was not presented at open hearing and as to which plaintiff had no opportunity to inspect, consider and cross-examine witnesses or offer evidence in explanation or rebuttal. This was a denial of due process."

"c) That part of the Board's decision reversing the Commissioner's action in denying the building permit, was a denial of due process because there had been no notice of any hearing on this issue and the hearings had not been conducted on this issue."

APPENDIX D.

(The final order of the Supreme Court of Illinois)

Be It Remembered, that, to-wit: on the 26th day of November, A. D. 1956, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

222 East Chestnut Street Corporation, a corporation of Delaware,

Appellant

No. 34074

vs.

Board of Appeals of the City of Chicago, Samuel T. Lawton, B. Emmet Hartnett, H. Evert Kincaid, C. Logan McEwen, and Robert C. Ostergren, individually and as members of the Board of Appeals of the City of Chicago; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; Lakefront Realty Corporation, a corporation of Illinois; Lake Shore Club of Chicago, a corporation of Illinois; City of Chicago, a municipal corporation of Cook County, Illinois; DeWitt Towers Corporation, a corporation; DeWitt Hotel, Inc., a corporation; Greater North Michigan Avenue Association; Northwestern University; American Hospital Association,

Appellees

Appeal from Superior Court Cook County 56 S 189

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid,

as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Superior Court of Cook County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 25th day of January, 1957
(Seal)

/s/ Mrs. Earle Benjamin Searcy
Clerk,
Supreme Court of the State of Illinois

Be It Remembered, that, to-wit: on the 23rd day of January, A.D. 1957, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

222 East Chestnut Street Corporation, a corporation of Delaware,
Appellant
No. 34074
vs.
Board of Appeals of the City of Chicago, et al., etc., et al.,
Appellees
} Appeal from Superior Court Cook County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

No. 320

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF AND ARGUMENT OF RESPONDENTS CITY OF CHICAGO, BOARD OF APPEALS OF CITY OF CHICAGO, ARTHUR T. LEVIN, E. BARRETT PRETTYMAN, JR., EVERT KINCAID, C. LOGAN McELWEE, ROBERT C. GEORGESON, and GEORGE L. RAMSAY, Constituting said Board of Appeals of the City of Chicago; EDWARD J. KELLY, Mayor and ex officio Commissioner of Buildings of the City of Chicago; LAKEBREST REALTY CORPORATION; LAKE SHORE CLUB OF CHICAGO; GREATER NORTH MICHIGAN AVENUE ASSOCIATION; NORTHWESTERN UNIVERSITY; and AMERICAN HOSPITAL ASSOCIATION IN OPPOSITION.

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SUBJECT INDEX.

PAGE

Cases Cited ii

Statement of the Case 2

Statutes Involved 3

Argument:

I. Lack of jurisdiction:

1) No federal question is involved 4

2) No "title, right, privilege or immunity" of petitioner is set up or claimed, within the meaning of the provisions of U.S.C.A. Title 28, Sec. 1257(3) 7

II. This court should not review this case:

1) The decision of the State Supreme Court was not a subterfuge to avoid the federal questions; it was an exercise of that Court's inherent function of adjudicating the law of the State 8

2) The Petition presents no reason why, in the exercise of its discretion, this Court should grant the writ of certiorari 9

Conclusion 10

Cases Cited

American Railway Express v. Kentucky, 273 U.S. 269 8
Angel v. Bullington, 330 U.S. 183 7
Ashwander v. Valley Authority, 297 U.S. 288 ..... 7, 9
Durley v. Mayo, 351 U.S. 277 7
Garner v. County of DuPage, 8 Ill. 2d 155 8
Hendrick v. Maryland, 235 U.S. 610 7
New York, ex rel v. Maltbie, 303 U.S. 158 7
Radio Station W O W v. Johnson, 326 U.S. 120 8
Stembridge v. Georgia, 343 U.S. 541 7
Voeller v. Neilston Co., 311 U.S. 531 7

Statutes Involved

Illinois Administrative Review Act 3, 4
U.S.C.A. Title 28, § 1257(3) 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 929

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

Board of Appeals of the City of Chicago, Samuel T. Lawton, B. Emmet Hartnett, H. Evert Kincaid, C. Logan McEwen, and Robert C. Ostergren, individually and as members of the Board of Appeals of the City of Chicago; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; Lakefront Realty Corporation, a corporation of Illinois; Lake Shore Club of Chicago, a corporation of Illinois; City of Chicago, a municipal corporation of Cook County, Illinois; DeWitt Towers Corporation, a corporation; DeWitt Hotel, Inc., a corporation; Greater North Michigan Avenue Association; Northwestern University; American Hospital Association,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF AND ARGUMENT OF RESPONDENTS CITY OF CHICAGO; BOARD OF APPEALS OF CITY OF CHICAGO; SAMUEL T. LAWTON, B. EMMET HARTNETT, H. EVERT KINCAID, C. LOGAN McEWEN, ROBERT C. OSTERGREN, individually and as members of the Board of Appeals of the City of Chicago; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of the City of Chicago; LAKEFRONT REALTY CORPORATION; LAKE SHORE CLUB OF CHICAGO; GREATER NORTH MICHIGAN AVENUE ASSOCIATION; NORTHWESTERN UNIVERSITY; and AMERICAN HOSPITAL ASSOCIATION, IN OPPOSITION.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

These respondents oppose the granting of a writ of certiorari in this proceeding, and in support of their opposition we submit this Brief and Argument.

STATEMENT OF THE CASE.

Petitioner's statement of the case contains so much irrelevant matter that we restate all of the facts we deem pertinent to a consideration of the petition.

This proceeding is one brought under the Administrative Review Act of Illinois, the relevant portions of which are quoted under the heading "Statutes Involved." This statute established procedures for judicial review of decisions of administrative agencies. Petitioner brought the proceeding under this statute in the lower state court to review a decision of the Board of Appeals of the City of Chicago, (Petn. 10; abst. 1-16), an administrative agency established under Ch. 24, Ill. Rev. Stat. 1955, § 73-3. That Board decided the issues adversely to Petitioner (Abs. 64-75).

The lower court affirmed the decision of the Board of Appeals (Abst. 131-135), and petitioner appealed to the Supreme Court of Illinois, raising numerous points, including federal questions [10 Ill. 2d 131; App. A to Petn. p. 1(a)]. That court affirmed the lower court and denied rehearing. [Petn. 10-11; App. D to Petn. pp. 20(a)-22(a).] Its decision was expressly based on the point that the evidence did not establish that petitioner had the interest or standing requisite to maintain the suit either under the Administrative Review Act or under the Revised Cities and Villages Act (Ill. Rev. Stat. 1955, Chap. 24), par. 73-9, quoted on pp. 12(a)-13(a) of App. B to the Petition. In its opinion the Court expressly excludes all other grounds for its decision and incident orders [10 Ill. 2d 131; App. A to Petn. p. 1 (a).]

Petitioner admits that the federal questions were not passed on by the Supreme Court of Illinois (Petn. 12).

STATUTES INVOLVED.

Following are all the relevant portions of all statutory provisions referred to herein, except those incorporated in Exhibit B to the petition (Petn. 7(a) to 13(a)):

ILLINOIS ADMINISTRATIVE REVIEW ACT.
(Ill. Rev. Stat., 1955, Chap. 110, pars. 264, 265)

"An Act in relation to judicial review of decisions of administrative agencies. Approved May 8, 1945. L. 1945, p. 1144.

"Be it enacted by the People of the State of Illinois, represented in the General Assembly:

"264. § 1. (Definitions). For the purpose of this Act: 'Administrative Agency' means a person, body of persons, group, officer, board, bureau, commission or department (other than a court, judge, justice of the peace or magistrate) of the State, or of any political subdivision thereof or municipal corporation therein, having power under law to make administrative decisions.

* * * *

" 'Administrative decision' or 'decision' means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties * * *.

"265. § 2 (Scope of Act). This Act shall apply to and govern every action to review judicially a final decision of any administrative agency * * *."

U.S.C.A. TITLE 28, § 1257 (3).

"Final judgments * * * rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * *

"(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of the United States."

ARGUMENT.

I.

This case is not within the jurisdiction of this court.

1) *No federal question is involved.*

As Petitioner admits (Petn. 12), the Supreme Court of Illinois did not decide any federal question; and no federal question is involved in its decision or the incident orders.

The decision and orders were based solely on an interpretation by that Court of two Illinois statutes, (the Administrative Review Act and Sect. 73-9 of the Revised Cities and Villages Act) and their application to the evidence.

The provisions of the Administrative Review Act impliedly construed by the Court are:

> "264. § 1. (Definitions). For the purpose of this Act:
>
> "'Administrative decision' or 'decision' means any decision, order or determination of any administrative agency rendered in a particular case, *which affects the legal rights, duties or privileges* of parties * * *.
>
> "265 § 2 (Scope of Act). This Act shall apply to and govern every action to review judicially a final decision of any administrative agency* * *." (Emphasis added)

In construing these provisions the Court held, directly or by necessary implication:

> 1. That an administrative decision, to be reviewable under the Act, must affect the "legal rights, duties or privileges" of the party seeking the review.

2. That there was in the record no evidence or presumption to show that the decision of the Board of Appeals of the City of Chicago in this case affected any such rights, duties or privileges of the plaintiff (petitioner here).

3. That since the plaintiff did not show that it was adversely affected by the decision of the lower court the decision of that court should be affirmed.

This is very clearly stated by the Court in the following portions of its opinion [10 Ill. 2d., 131-132; Appendix A to Petn. pp. 1(a)—2(a)]:

"Eight grounds for reversal are asserted, including constitutional objections which permit of a direct appeal to this court. However, there is one controlling point, the question of the plaintiff's interest or standing to maintain the action.

"In *222 East Chestnut Street Corp.* v. *Board of Appeals, No. 34210,* decided this day, the same allegations of injury are involved. We there hold that these allegations must be supported by evidence and are not made out by a mere showing that plaintiff's building was 184.5 feet from the proposed building and in the same contiguous zoning district. In short, mere proximity without proof of actual damage is not sufficient.

"Here, the plaintiff's building is 293 feet distant and there is neither evidence nor presumption to show an adverse effect on the plaintiff by the proposed structure in regard to light and air, traffic congestion, or real estate values. It is not a party 'whose rights, privileges or duties were adversely affected by the decision' of the administrative agency, and it has no right to a review of the agency's determination."

The portions of the second statute construed by the Court are [Exh. B to Petn. p. 12(a)]:

> "§ 73-9. Proceedings to prevent Violation. In case any building or structure is constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this article, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, *or any owner or tenant of real property in the same contiguous zoning district as the building or structure in question,* in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation." (Emphasis added).

In construing these provisions the Court held that this statute did not apply to the plaintiff (Petitioner here); saying in its opinion [10 Ill. 2d, 132; Appendix A to Petn., p. 2(a)]:

> "Finally, the plaintiff is not aided by section 73-9 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1955, chap. 24, par. 73-9.) providing that an action or proceeding to prevent a zoning violation may be instituted by the municipality *or by an owner or tenant of real property in the same contiguous zoning district.*" (Emphasis added).

Thus the opinion states the law of Illinois, with respect both to this statute and the Administrative Review Act, as applied to the facts in the record as shown by the evidence. The effect was the same under both statutes, namely, that the record did not substantiate plaintiff's right to maintain the suit.

No decision of any federal question was involved in this judgment. The Illinois Supreme Court did not consider it necessary to pass on any of the federal questions. The decision was solely one respecting the law of Illinois, and as such is not reviewable by this court. *Durley* v. *Mayo*, 351 U.S. 277, 280-285 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952); *Angel* v. *Bullington*, 330 U.S. 183, 191-192 (1947); *New York, ex rel* v. *Maltbie*, 303 U.S. 158, 160 (1938).

For this reason the petition should be dismissed.

2) *No "title, right, privilege or immunity" of petitioner is set up or claimed, within the meaning of the provisions of U.S.C.A. Title 28, Sec. 1257(3).*

Petitioner bases jurisdiction of this Court over this proceeding on U.S.C.A. Title 28, Sec. 1257(3). The only part of that section which could conceivably apply to this Petition is the part providing for review by certiorari "where any title, right, privilege or immunity is specially set up or claimed" under the federal constitution.

But obviously the decision of the State Supreme Court negatived the existence of any such "title, right, privilege or immunity" by holding that, on the record of the case Petitioner had none—a determination, as above pointed out, binding upon this Court.

Only those who have been injured by denial of constitutional rights can invoke this Court's jurisdiction on constitutional questions. *Voeller* v. *Neilston Co.*, 311 U.S. 531, 537 (1940); *Hendrick* v. *Maryland*, 235 U.S. 610, 621 (1915); *Ashwander* v. *Valley Authority*, 297 U.S. 288, 347-348 (1936).

Thus the petition does not fall within the provisions of U.S.C.A. Title 28, Sec. 1257(3) and should be dismissed.

II.

This court should not review the proceedings in the Supreme Court of Illinois.

1) *The decision of the State Supreme Court was not a subterfuge to avoid the federal questions; it was an exercise of that Court's inherent function of adjudicating the law of the State.*

In the exercise of its discretion this Court may of course consider whether the Illinois Supreme Court avoided the federal questions as a subterfuge. *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 129 (1945); *American Railway Express* v. *Kentucky,* 273 U.S. 269, 273 (1927).

However, the decision was in no sense a subterfuge. On the contrary it was clearly an exercise of that Court's inherent function of construing statutes and otherwise adjudicating the laws of its State. The decision was consistent both with the two Illinois Supreme Court cases cited in it (involving the two statutes) and also with the decision in the recent case of *Garner* v. *County of DuPage,* 8 Ill. 2d. 155 (1956) holding that in a chancery suit a person must prove special damage in order to complain of a permitted change in the zoned use of another's property.

Indeed, this Court itself has frequently recognized and applied the principle that it will not pass upon a constitutional question "if there is also present some

other ground upon which the case may be disposed of"; and that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander* v. *Valley Authority*, 297 U. S. 288, 347 (1936).

Thus it is the declared policy of this Court to do, with respect to federal questions, exactly what the Illinois Supreme Court did with respect to questions regarding the law of that State.

There is thus in this respect no ground for granting the writ.

2) *The Petition presents no reason why, in the exercise of its discretion, this Court should grant the writ of certiorari.*

This petition is not within either the letter or the spirit of Rule 19 of this Court respecting the basic reasons upon which the Court will exercise its discretion to grant writs of certiorari. The only portion of that rule specifically applicable to review of a state court decision is paragraph (a). It does not apply to this case for the reason that the state court did not decide any federal question. Nor is this case within the spirit of the rule, which excludes from its scope cases which, like this one, deal

only with controversies which have no substantial general significance in federal jurisprudence.

Conclusion.

We therefore urge that the petition should be dismissed for lack of jurisdiction or denied for want of merit.

Respectfully submitted,

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